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May 4, 2010

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

**Re: In the Matter of Applications Filed for the Transfer of Control of Hawaiian Telcom, Inc.
and Hawaiian Telcom Services Company, Inc., Debtors-in-Possession, WC Docket
No. 10-41, DA 10-409**

Dear Ms. Dortch:

This responds to Hawaiian Telcom, Inc. and Hawaiian Telcom Services Company, Inc.'s ("HT") April 7, 2010 Reply to the Comments in Opposition of Time Warner Cable ("TWC"), filed March 24, 2010 in the above-referenced matter.

Contrary to HT's allegations that TWC's comments are "spurious" and "totally unrelated to the pending Applications,"¹ HT's actions lie at the heart of the Commission's public interest assessment. The Commission has said repeatedly that as part of its analysis it "considers whether [the transaction] could result in public interest harms by *substantially impairing the objectives or implementation of the Communications Act* or related statutes."² This is precisely the point: approval of HT's 214 applications would both enable and reward HT's violations of the Communications Act. Even though HT asserts that the Section 214 process is the incorrect place to raise these issues,³

¹ Hawaiian Telcom, Inc. and Hawaiian Telcom Services Company, Inc. Reply to Comments, WC Docket No. 10-41 (filed Apr. 7, 2010) at 1 (hereinafter "Reply Comments").

² See, e.g., *Applications Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire, and Vermont from Verizon Communications Inc. and Its Subsidiaries to FairPoint Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 514, 519 (2008) (emphasis added).

³ Reply Comments at 5.

this is precisely the sort of input on which the Commission relies in ensuring that the Communications Act is honored; this proceeding is the most efficient means for quickly resolving these questions.⁴ And unlike a prior section 214 proceeding⁵ in which the Commission declined to impose conditions on the grant of a transfer of control because of allegations of pole-attachment abuse, there is no open and on-going pole-attachment enforcement proceeding here.

In fact, TWC's goal in submitting comments here was to facilitate a prompt and efficient resolution of this dispute which affects not only TWC, but its customers and other facilities-based competitors who must rely on access to the poles and conduits that HT owns and controls. Given the burdens and time delay that a formal pole-attachment complaint proceeding would impose on Commission staff, TWC and other interested parties,⁶ TWC continues to believe that *this proceeding* could most immediately and efficiently facilitate a more robust broadband market in Hawaii. These factors, in addition to the Commission's focused if not urgent commitment to broadband, would seem to warrant the Commission's intervention here.

In addition to these compelling reasons for taking action here, HT's Reply Comments contain a number of errors that require correction. For example, on the question of overlashing, HT appears to try to justify its actions by saying they are required for safety purposes. Safety, of course, is a critical factor in pole attachments, but the law is clear that overlashing must not be subject to a full-blown permit process and that only "reasonable notice" is required.⁷ HT has freely admitted that it does not allow TWC to overlash fiber to existing plant unless the poles are free of all safety violations.⁸ This effectively puts the entire burden of making those corrections on TWC – whether or not TWC caused the violations or had anything to do with them whatsoever. At a minimum it is more than fair to ask if HT holds itself to this same standard. Does HT, in fact, *not* overlash unless and until the pole is 100% clear? Does it delay its own deployment – for months or indefinitely – until this occurs? These are critical questions that run to the core of the transaction at issue here.⁹

⁴ See, e.g., *In re Application of GTE Corporation and Bell Atlantic Corporation*, Memorandum Opinion and Order, 15 FCC Rcd 14032, 14036 (2000) ("[W]e find in this Order that, absent conditions, the merger of Bell Atlantic and GTE will harm consumers of telecommunications services by . . . increasing the merged entity's incentives and ability to discriminate against entrants into local markets of the merging firms.").

⁵ See *North Pittsburgh Systems, Inc. to Consolidated Communications Holdings, Inc.*, WC Docket No. 07-151, DA 07-4520 (released November 5, 2007)

⁶ As examples, from the date the complaint was filed in *Salsgiver Telecom, Inc. v. N. Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 9285 (2007), it took nearly 16 months for the Commission to release its final order; and in *Salsgiver Commc'ns, Inc. v. N. Pittsburgh Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 20,536 (2007), it took more than 21 months.

⁷ See *In re Amendment of Commission's Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12144-45, ¶¶ 75, 82 (2001).

⁸ See Reply Comments at 6.

⁹ See, e.g., *Knology, Inc. v. Ga. Power Co.*, Memorandum Opinion & Order, 18 FCC Rcd 24615, 24629 (2003) ("[I]t is an unjust and unreasonable term and condition of attachment, in violation of section 224 of the Act, for a utility pole owner to hold an attachor responsible for costs arising from the correction of other attachers' safety violations."); *Cavalier Tel. v. Va. Elec. & Power Co.*, Order &

HT has taken the position that TWC cannot overlash unless it has, in hand, a paper permit showing that it is authorized to attach to each pole where its attachments are located (and in many cases have been for 30 years).¹⁰ In its Reply, HT says that its paper-permit overlash prerequisite is merely a means of assessing responsibility for safety violations. This is nonsense. The most that a paper permit can do, standing alone, is provide one small piece of the puzzle and show when and under what terms the permit was granted. After all, an attachment installed in a manner consistent with the permit instructions at installation may have “changed” over the years. Poles are located outside in an extremely dynamic environment, not inside in a static one. Outside plant is exposed and subject to weather, vehicle accidents, workers, and change in character in the surrounding environment (i.e. yesterday’s farms are today’s subdivisions and strip malls).

It appears, moreover, that HT conflates a proper permit with causation: whatever evidentiary value a piece of paper may have to prove that a particular attachment was “authorized,” its existence does not prove which, if any, entity is responsible for a safety violation. As HT correctly, but contradictorily, points out in the preceding paragraph of its Reply Comments, “[f]rom a safety perspective, it is irrelevant which entity with a pole attachment has caused an unsafe condition.”¹¹ What is not irrelevant, and indeed, what is at the heart of the Commission’s public interest analysis here, is that it is manifestly unjust, unreasonable and discriminatory to saddle TWC with the burden of cleaning up HT’s plant as a pre-condition to overlash.

HT also argues that it has never rejected a TWC permit for reasons other than safety and generally accepted engineering purposes. This is simply untrue. For example, on March 22, 2010 – just two days before the Comments in this proceeding were due – HT rejected an overlash request (a “Work Access Request,” or “WAR”) on the basis of “insufficient space . . . due to Hawaiian Telcom’s pending project for that route.”¹² A more blatant violation of the Communications Act is hard to imagine. While electric utilities under certain narrow circumstances may reserve space (only for core electric service and under a *bona fide* development plan that reasonably and specifically projects the utility’s need for the space reserved),¹³ Section 224 does not extend the same power, or deference, to telephone companies like HT.¹⁴

Request for Information, 15 FCC Rcd 9563, 9571 (2000) (“Complainant is only responsible for make-ready costs generated by its own attachments. Respondent is prohibited from holding Complainant responsible for costs arising from the correction of safety violations of attachers other than Complainant.”); *In re Amendment of Commission’s Rules and Policies Governing Pole Attachments*, Consolidated Partial Order on Reconsideration, 16 FCC Rcd 12103, 12144-45, ¶ 82 (2001).

¹⁰ See, e.g., Email from Donna Rae Lum, Hawaiian Telcom, to Dwight Kaneshiro, Oceanic Time Warner Cable, Re: OTWC – WAR 884 (Feb. 19, 2010) (attached as Ex. 1).

¹¹ Reply Comments 6-7.

¹² See Letter from Donna Rae Lum, Hawaiian Telcom, to Lance Uno, Oceanic Time Warner Cable (Mar. 22, 2010) (attached as Ex. 2).

¹³ See 11 FCC Rcd 15499, 16078 ¶ 1169 (1996).

¹⁴ 47 U.S.C. § 224(f)(2) (emphasis added) (“a utility providing *electric service* may deny a cable television system . . . access to its poles . . . where there is insufficient capacity.”).

Likewise, HT admits to missing the 45-day deadline for approving or rejecting permit applications,¹⁵ but blames this delay on its joint pole owner, Hawaiian Electric Company, Inc. The reality is that HT administers and controls access to the communications space on all poles to which it attaches. That HT has no control whatsoever over missing the 45-day deadline by, in some cases, as long as two years ignores that it – and not Hawaiian Electric – is the communications space gatekeeper on the poles to which it attaches.

Finally, HT's assertion that its application procedures and charges are consistent with Commission rules is not credible. As discussed above, HT's unlawful overreaching requirements, unreasonable permit denials and persistent failure to respond to permit requests all constitute unjust, unreasonable and discriminatory pole and conduit application procedures in violation of the Communications Act and Commission rules.

Likewise, HT's outlandish engineering and make-ready fees defy Commission requirements that they be cost-based. Despite TWC's requests, HT has not explained the basis for these charges in any form approaching that required by Commission precedent.¹⁶ There have been numerous instances where HT has denied applications outright without adequate – or any – explanation. But exorbitant, prohibitive costs (such as \$2500 to perform an engineering study on a single pole)¹⁷ is tantamount to a red-stamped "permit denied."

HT's behavior here presents a compelling textbook case as to why the Commission's National Broadband Plan recommendation to require hard deadlines for physical access – and penalties and damages if the deadlines are not met – are well-founded. It presents an equally compelling case for the imposition of Section 214 transfer conditions on this transaction to ensure that these abuses stop immediately and do not re-appear pending adoption of specific Commission rules in this area.

Sincerely,



J. D. Thomas
Partner
dave.thomas@hoganlovells.com
D (202) 637-5675

JDT/dg

cc: Gregory J. Vogt, Esq.

¹⁵ See 47 C.F.R. § 1.1403(b).

¹⁶ See, e.g., *Knology*, 18 FCC Rcd at 24641-42 ¶¶ 59-62.

¹⁷ Letter from Donna Rae Lum, Hawaiian Telcom, to Lance Uno, Oceanic Time Warner Cable (Apr. 22, 2009) (attached as Ex. 3).

Exhibit 1

Kaneshiro, Dwight

From: Donna Rae Lum [DonnaRae.Lum@hawaiiantel.com]
Sent: Friday, February 19, 2010 3:25 PM
To: Kaneshiro, Dwight
Subject: RE: OTWC - WAR 884

Dwight,

The original cable placement related to the new WAR 884 may be the result of one or more COR(s) and maps. If Oceanic is only able to locate COR(s) for a portion of the route, then the remainder of the route would be considered an unauthorized occupancy, subject to penalties. At that point, Oceanic can either remove its 'unauthorized' facilities or submit a COR for the existing facilities. Hawaiian Telcom will then review the COR and determine if the existing facilities can remain or make ready costs are required in order for Oceanic's facilities to remain.

Donna Rae

Donna Rae Lum
Specialist - Network Engineering
Network Engineering Support
Hawaiian Telcom
Phone: 808-546-7666
Fax: 808-546-6938

From: Kaneshiro, Dwight [mailto:dwight.kaneshiro@twcable.com]
Sent: Friday, February 19, 2010 2:27 PM
To: Donna Rae Lum
Subject: RE: OTWC - WAR 884

Thanks Donna for the quick response. I have that COR as well but it refers to a different map (3806). COR 499 has the same map as the WAR that I'm submitting. Will that suffice?

Mahalo, Dwight

From: Donna Rae Lum [mailto:DonnaRae.Lum@hawaiiantel.com]
Sent: Friday, February 19, 2010 11:57 AM
To: Kaneshiro, Dwight
Subject: RE: OTWC - WAR 884

Dwight,

I was only able to locate COR 484 which is on part of your route.

Donna Rae

Donna Rae Lum
Specialist - Network Engineering
Network Engineering Support
Hawaiian Telcom
Phone: 808-546-7666
Fax: 808-546-6938

DIA

From: Kaneshiro, Dwight [mailto:dwight.kaneshiro@twcable.com]
Sent: Friday, February 19, 2010 8:52 AM
To: Donna Rae Lum
Subject: OTWC - WAR 884

Hi Donna,

Respectfully submit WAR 884. As discussed yesterday, the attached original COR is from my research. I'm not sure if it's correct, nor if there is another one to address my request. I'm trying not to submit incomplete applications and avoid penalties as well. If it is acceptable let me know and I'll send the hard copies. If it's incorrect, could you send me the right number?

I really appreciate your valuable time. Feel free to contact me at anytime with questions.

Mahalo, Dwight

Dwight Kaneshiro
Project Manager
808-625-9739
808-349-6388
dwight.kaneshiro@twcable.com



"Few things help an individual more than to place responsibility upon him, and to let him know you trust him." ~ Booker T. Washington

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D20

Exhibit 2

Hawaiian Telcom ●

March 22, 2010

Mr. Lance Uno
Oceanic Time Warner Cable
200 Akamainui Street
Mililani, HI 96789

Dear Lance,

SUBJECT: OCEANIC TIME WARNER CABLE'S WAR 896 – 98-1468 HOOMAHIE LP, PEARL CITY

Hawaiian Telcom rejects Oceanic Time Warner Cable's WAR 896 due to insufficient space for the proposed placement of a 1" subduct with 0.50" fiber cable from MH 2425 (MH1) on Hoohiki Street to HH 21720 (HH2) at Hoohiki Street and Hoomahie Loop, due to Hawaiian Telcom's pending project for that route.

According to our records, the 3-4" conduits noted on the drawing from HH 21720 (HH2) Hoohiki Street and Hoomahie Loop to PB 21731 (PB3) Hoomahie Loop does not exist. The 3-4" conduits go further up Hoohiki Street and does not traverse off to Hoomahie St.

Oceanic Time Warner Cable will be billed for the engineering fee to review this request. The estimated review fee is \$500.00.

If there are any questions, please give me a call at 546-7666.

Sincerely,



Donna Rae Lum
Specialist – Network Engineering

Attachment

cc: L. Yoshida – HIA10

OTWC
METER BOX



BRYAN'S MAP 91, E3 MAP GRID #5317

SITE NAME: PEARL CITY
SITE ID: HI011391
ADDRESS: 98-1468 HOOMAHIE LOOP

OCEANIC TWC REQUEST PERMISSION TO PLACE (1) 1" SUBDUCT W/ (1) .50" FO CABLE FROM HT MH1 HOOHIKI STREET TO HT PB3 HOOMAHIE LOOP.

PLEASE REFERENCE THE HIGHLIGHTED AREA ON THE PROJECT SITE PLAN.

NOTE:
MAINTENANCE HOLE NUMBERS ON PROJECT SITE PLAN MAY NOT BE
ACTUAL HAWAIIAN TELCOM NUMBERS. IT IS BEING USED ONLY TO
CROSS REFERENCE WITH OTHER ATTACHED DOCUMENTS.

ALL SPLICE/COIL TO BE PLACED WITHIN OTWC MAINTENANCE HOLE.

W.O.#: HIO11391
SCALE: AS SHOWN
DRAWN BY: DCD DATE: 2-17-2010
DESIGNED BY: _____
ENGINEERED BY: _____
ENG. PHONE #: _____



OCEANIC
TIME WARNER
CABLE

200 AKAMAINUI STREET
MILILANI, HI 96789-3999
PHONE # (808) 625-8100

Exhibit 3

W
APR 27 2009 MK

Hawaiian Telcom ●

April 22, 2009

Mr. Lance Uno
Oceanic Time Warner Cable
200 Akamainui Street
Mililani, HI 96789

Dear Lance,

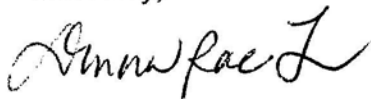
Subject: Oceanic Time Warner Cable's WAR 808(Overlash) School Street, Lusitana Street and Puowaina Street, Alakea

Hawaiian Telcom (HT) rejects Oceanic Time Warner Cable's WAR 808. Pole 4 on School Street is not adequately sized for Oceanic's proposed attachment. Should Oceanic decide to pursue make ready work for this pole, please submit a request in writing.

Oceanic will receive a bill for the engineering fee to review this request. The estimated review cost is \$2,500.00.

If there are any questions, please give me a call at 546-7666.

Sincerely,



Donna Rae Lum
Specialist – Joint Use

CC: G. Hayashi / L. Yoshida – A-10

C31